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A POPULAR TREATISE

ON THE LAW OF

MARRIAGE AND DIVORCE

BY M. S. ROBINSON,

OF THE CHICAGO BAR.

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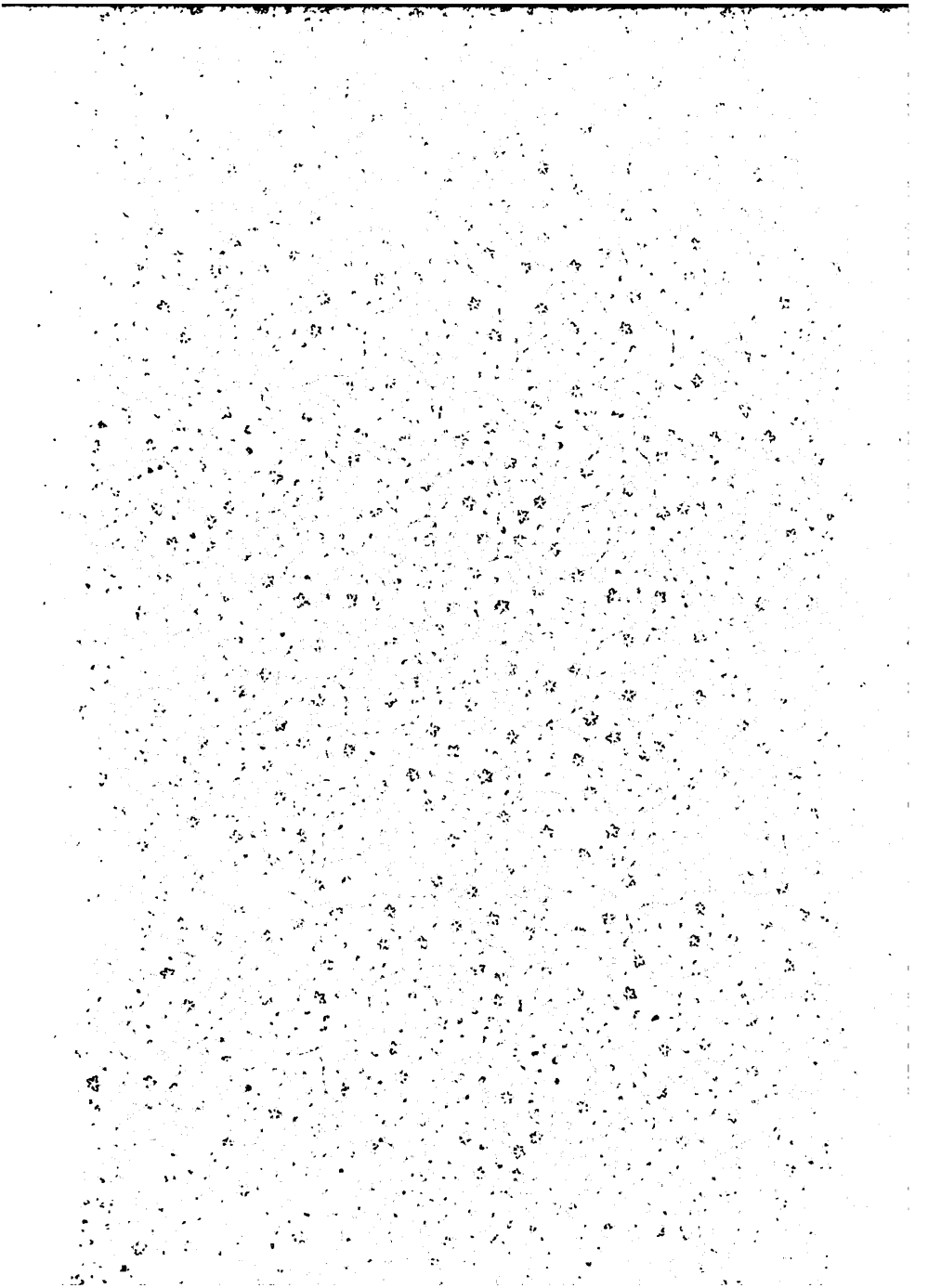

A POPULAR TREATISE

ON THE LAW OF

MARRIAGE AND DIVORCE.

BY

M. S. ROBINSON,

Of the Chicago Bar.

GIVING THE LAWS OF THE VARIOUS STATES OF THE UNITED STATES, ENGLAND AND THE CONTINENT,

WITH A

CONDENSED HISTORY OF THE ROMAN, CANON AND ECCLESIASTICAL LAW.

The causes for which Divorces will be granted in the States; Time of residence requisite; What are and what are not legal Marriages and valid Divorces; What Courts have and what have not jurisdiction to grant, etc.; The various causes for Divorce; The mode and manner of proof; The defenses thereto; How available; The rights, duties and obligations of parties thereto,

Together with the effect upon Persons, Right of Property, etc.

FOR SALE ONLY BY THE AUTHOR.

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1884.

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PREFACE.

During an enforced idleness of some weeks' duration, in the summer of the present year, the following pages were penned, the main object being mental occupation, with a possible thought, perhaps, of future publication, with resulting financial profits should the work prove acceptable; and, remotely, a desire to benefit his fellow-man by disseminating a better knowledge of the law governing the contract and status of marriage, its privileges, rights and duties, both in relation to the immediate parties thereto and their obligations to the society in which they live.

There are few subjects so little understood by the average citizen as that of the law governing marriage and divorce. This ignorance is, to some extent, shared by a large percentage of the legal profession, as a large number of letters in the possession of the writer from attorneys at law throughout the country will show. It is no unusual thing for lawyers practicing in large commercial centers, to receive letters from lawyers in country

towns or cities, making inquiries as to the divorce laws of their locality, "stating that they have clients who wish to obtain divorces in some foreign jurisdiction, in order to avoid scandal at home"; or to take advantage of some fancied liberality in the laws of other localities. Now the law is, and has been for the last century—and has been so laid down by law-writers and the courts—that no court has any right, authority or jurisdiction to decree a divorce for any person not an actual *bona fide* resident of the locality of the court. And as well might the Czar of Russia attempt to regulate the domestic affairs of a resident of America, as for the courts of one state to decree a divorce for a resident of another state. And if lawyers are sometimes in error upon this point, it is no wonder that most lay citizens labor under a like delusion. In all large cities there are a class of SHYSTERS, masquerading under the garb of an honored profession, who insert in leading newspapers advertisements like this:

"*A. Blank, attorney at law, 24 Shyster Row. Divorces legally and quietly obtained. Twenty years' experience. Advice free. Charges reasonable.*"

It is hardly necessary to say that all these parties are frauds; that not one decree in twenty obtained through them affords any protection at all to its possessor. Yet, it is a well-known fact that they are extensively patronized, and reap golden harvests from uninformed, *but hardly honest clients.*

To those who have patronized these divorce sharks, and to those who may be tempted so to do, this little book is dedicated. A careful perusal of its contents may enable them to protect themselves against fraud, and possibly save some of them from the penitentiary.

There is but one road over which one must travel to undo a marriage, and this is through the channels of the local courts, where one, at least, of the parties permanently resides and has his or her domicile. A divorce obtained otherwise, though red-taped, red-lined, and bearing a golden seal, is but as waste paper, and no protection whatever at any time or place.

The writer lays no claim to originality in anything herein contained, except as to the manner in which the whole is bound together—the grain belongs to others, the binding is his. He has

copied largely from Bishop's admirable works on marriage and divorce, as well as from other standard writers on law, also from historical works, cyclopædias, etc., using their language *verbatim* sometimes; at other times changing it to suit his ideas, not always giving due credit by a reference to his authorities. The aim has been to avoid all technical language, that all who can read may fully understand the law of their country upon a subject all-engrossing to every citizen of whatever standing, sex or social position. For marriage is the fountain-head from which must flow the future population, and through it mold for weal or woe the moral nature of the people of the future—so pregnant with great possibilities—looking to the final triumph of mankind over all animate and inanimate nature, and the ultimate final glory of the human race.

THE AUTHOR.

CHICAGO, ILL., October 1, 1884.

CHAPTER I.

MARRIAGE, GENERAL VIEW OF: WHAT FORM OF SOLEMNIZATION, IF ANY, REQUIRED, ETC.

"There is nothing connected with the social welfare of the world," says Mr. Bishop, "concerning which a greater harmony prevails, in the opinions of mankind, than the great and underlying truths which pertain to the law of marriage, considered as a civil institution. Everywhere the doctrine is received, that men and women should not follow their mere animal instincts in their social relations to one another, but that they should 'pair off,' to use an expression applied to the birds of the air.

"The institution of marriage, commencing with the race and attending man in all periods and in all countries of his existence, has ever been considered the particular glory of the social system. It has shone forth in dark countries, and in dark periods of the world, a bright luminary on his horizon. And but for this institution, all that is valuable, virtuous, and desirable in human exist-

ence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and hopes would have been wrecked together.

"And as man has gone up in the path of his improvement, and a purer light has surrounded him, still has this institution of marriage, receiving accessions of glory with every step of the race toward its ultimate glory, remained the first among the institutions of human society.

"The word *marriage* is used in two different senses, the one denoting the act of entering into the marriage relation, the other the relation itself. Marriage is defined to be the civil status of one man and one woman united in law for life, under the obligations to discharge to each other and the community, those duties which the community, by its laws, holds incumbent on persons, whose association is founded on the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations; and since it can exist only in pairs, and since none are compelled, but all who are capable are permitted, to assume it, marriage may

be said to proceed from a civil contract between one man and one woman, of the needful physical and civil capacity. While the contract is merely an executive agreement to marry, it differs not essentially from other executory civil contracts. It does not superinduce the status; and, on its violation, an action may be maintained by the party injured to recover damages of the other. But when the contract is executed in what the law regards a valid marriage, its nature as a contract is merged in the higher nature of the status, and through the new relation (that is, the status), retains some similitudes reminding us of its origin; the contract does in truth no longer exist, but the parties are governed by the law of husband and wife."—*Bishop on M. and D., Vol. I, Chap. 1.*

In the various states of the United States, then, what is necessary to constitute a complete and valid marriage? or, rather, are the ceremonies and forms, or any of them, which are indicated by law, or are customarily used for the solemnization of marriage, indispensable to a valid marriage, or is the mere consent of the parties sufficient? This question has received great attention, both in

England and the United States, and has been passed upon by the English courts in the case of The Queen *vs.* Millis, decided in the house of lords in 1844. The facts of this case were like this: The defendant, Millis, a member of the Established Church of England, was married in Ireland to a woman not a member of said church, by a Presbyterian minister, according to the form usual with Presbyterian dissenters, and under this marriage the parties cohabited for two years as husband and wife. Afterward, while this woman was still living, Millis married, in England, another woman, in a form about which no dispute arose. He was indicted in Ireland for polygamy.

The first marriage contained all the essentials of a valid marriage in England, except that it was not solemnized according to the form prescribed by the Established Church of England. Was it a marriage upon which an indictment for polygamy could be sustained? Upon this question the judges in Ireland were equally divided, but in order that the case might be taken to the house of lords, gave a decision against the defendant.

Upon appeal to the house of lords, the ques-

tion of the validity of the marriage by mere consent, was fully argued by the ablest counsel in England, and the six law peers gave their opinions severally, each at great length, but they were equally divided: this equal division affirmed the judgment of the court below, and Millis was sentenced. Almost at the same time the same question came before the Supreme Court of the United States, and Chief Justice Taney in deciding the case (upon other grounds) said, upon this point, "The court is equally divided, and no opinion can be given." *Jewell vs. Jewell, 1st Howard U. S. 219.*

Chancellor Walworth in the case of *Rose vs. Clark, 8 Paige 574*, considers the ancient common law doctrine to have been, that the marriage was invalid unless celebrated *in facie ecclesiæ.* But that the law upon this subject was undoubtedly changed at the Reformation, if not before. For, he says, "it is now the settled rule of the common law, that any mutual agreement between the parties, to be husband and wife, *in presenti*, when it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony."

And the steady tendency of American decisions is in this direction, and it is believed that such is the law in the United States to-day.

Bishop, after noticing and approving the doctrine laid down by Chancellor Walworth, *supra*, says, "Whether the American courts will be influenced by the opinions expressed adversely to this kind of marriage in the Queen vs. Millis, and so the shadow go back on the dial-plate of our jurisprudence, must be left for future judicial determination."

That the shadow has not gone back on the dial-plate of our jurisprudence, can be readily seen by a glance at the more modern decision of our courts of last resort.

At common law, then, it may be safely assumed that no form of solemnization of marriage is necessary; that when two persons of opposite sex, being physically and legally competent to assume marriage, deliberately contract and agree to be man and wife, and follow up such agreement by cohabitation as husband and wife, then and in that case, without doubt, such parties are legally and firmly married.

Then the question arises, Does the statutory law

of the various states, prescribing certain forms in which marriage shall be solemnized, make it necessary to follow these forms in order to assume the marriage relationship? In other words, are all marriages solemnized contrary to the prescribed forms of the statutory law of the place of marriage void?

Bishop says, *Sec. 283, Vol. I.*, in treating of this subject, "We are next to seek for the rules of interpretation to determine, whether or not, in a given case, a statute has altered the common law upon the subject.

The principle is by no means universal, that, when a statute directs a thing to be done in a particular way, it is void done in any other way. Sometimes, indeed, it is,—not always. The distinction relates to what are termed mandatory and directory statutes. If a statute is mandatory, a thing done not according to its direction is void; if directory, it is not void. Yet it is not easy, probably not possible, to lay down in advance a rule by which it can certainly be determined what statutes are directory, and what are mandatory. The nature of the subject has something to do with the question. If we remember, there-

fore, that marriage existed before the statutes, that it has ever been regarded as a thing to be favored in the law, and also that it is of natural right, we shall see very plainly that, whatever directions a statute may give concerning its solemnization, it should be held good, though not solemnized according to the directions; consequently the doctrine has become established that a marriage good at common law, is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity.*

This rule applies not only to a statute as a whole, but to the several parts of it; so that, if it declares the marriage void for non-compliance with a particular provision, it is good notwithstanding a failure to comply with any other provisions. This rule, like most other legal rules now well settled, has struggled against some doubts and uncertainties, but it seems never . . . to have been successfully discarded in actual adjudication."

There is no doubt but that the doctrine above contended for, and as the writer fully believes is now well established in America by well-digested

decisions of the courts of final resort in the various states. It has been questioned, and the opposite doctrine ably and vigorously contended for, especially by the various religious denominations and churches. That doctrine which bastardizes children, and makes a woman a "sort of select strumpet," because of some slip in the form of a marriage ceremony, makes no appeal to the sense of justice, equity and right of any right-minded man, or civilized community, and the writer dismisses this part of his subject by a quotation from Mr. Bishop, which he fully indorses: "There was a time when the Anglo-Saxon race, though rude and uncultivated in modern chicanery, never inflicted the disgrace of concubinage on a woman who lived with one man, and one man only, as his wife, and bore him children, unless the man was of too close affinity or consanguinity to her, or unless he had another wife to whom he had been earlier married."

In commenting on the reverse of this doctrine, our author concludes, "Men who like to deceive honest women, and men who value riches in a wife, or a settlement more highly than true marriage, admire this, and they consider the Scotch

people who do not like it, and the people of some of the states, who also do not like it, to be, by reason of their want of love for the refinement, almost barbarians. May barbarism, if this is such, long prevail in the United States."

A resume of the law of marriage applicable alike to the various states (unless absolutely changed by positive and mandatory local law) is as follows:

Marriage is a civil contract. No person is compelled to assume it, but all may do so, being physically and legally competent. That while the agreement to marry is unexecuted, the law applicable to civil executory contracts applies to it. But after the agreement to marry is executed, then the contract merges into the status of marriage, and the law of civil contracts no longer applies, but the law of husband and wife regulates their conduct, the one with the other, and the community with them both. The status of marriage entered into through the channels of a civil contract, becomes now more than a civil contract. The interest of a third party (the community, wherein the husband and wife reside) attaches; and in order to dissolve the marriage the consent of

this third party must be obtained, through the channels of the courts, who alone are authorized to act for it. The policy of which is to sustain the marriage upon high moral grounds, and if there are children, upon economic grounds. For if the husband and wife separate, the children may become a public charge. Public policy and the law everywhere favor marriage and discountenance divorce.

Parties living together as husband and wife (in law) are presumed to be married; the contrary must be established by proof. No form of solemnization is absolutely necessary; mere consent, followed by cohabitation as husband and wife, constitutes a valid and binding marriage. But the basis of such marriage is the intent of the parties to be married. Mere cohabitation as husband and wife without the agreement or intention to marry does not constitute marriage, though it may and undoubtedly does constitute *prima facie* evidence of marriage, which is sufficient until overcome by positive evidence to the contrary. The intention of the parties can be gathered from their action, and no formal declaration of intention to marry is actually required. When two

intentions are attributable, the one good and pure, the other vicious and impure, the law will presume the former. Neither would the law require that the intention of both parties be good and pure. For if a man, intending to deceive and betray, should induce a woman to live with him as his wife, leading her to believe that no formal ceremony was necessary, or requisite, though believing to the contrary himself, nevertheless the marriage would be valid and binding, for the law would not permit him to show his own duplicity in order to relieve him of the consequences of his wrongful act.

CHAPTER II.

DIVORCE.

Divorce is the dissolution of the relationship of marriage. Few social questions are surrounded with greater difficulties than this. For what causes divorces should be granted, and whether complete divorce should be granted at all, in the sense of authorizing the spouse to contract new marriage, are points on which civilized societies have arrived at very different conclusions. Modern practice and opinion are to be traced mainly to two sources of principle, viz.: Roman law and the Christian religion. The effect of the spread of Christianity was to reinvest marriage with the religious character from which, in the later law of Rome, it had completely escaped; and the history of divorce in modern times has been the gradual decay of the restrictions which were thought appropriate to the religious character of the institution of marriage. At the same time, these restrictions have nowhere disappeared.

The opinion of society visibly fluctuates be-

tween the belief that marriage is a civil contract only and the belief that it is a contract of a peculiarly sacred character, the dissolution of which must not be lightly, if at all, permitted by human legislation. Again, divorce appears to be regarded sometimes as a penalty against the offending spouse, sometimes as a right which the innocent spouse is entitled to. It will be granted only if a matrimonial offense is proved to have been committed, but it will not be granted if such an offense has been committed on both sides.

CHAPTER III.

ROMAN LAW.

In Roman law marriage was regarded as a voluntary union, which might be terminated at any time by the consent of the parties. No legal process was required, although the abuse of the power of divorce was sometimes punished. Until the time of Justinian, divorce by consent of both parties does not appear to have been subject to any restriction. Justinian, however, allowed it only in three specified cases, viz.: For impotency, or where either party desired to enter on a monastic life, or was for a long time in captivity. At a later period, Justinian enacted, that persons dissolving a marriage by mutual consent should forfeit all their property, and be confined to a monastery during life, two-thirds of the property forfeited going to the children of the marriage, one-third going to the monastery where the parties were confined. This severity, so much at variance with the Roman spirit, indicated the growing power of the clergy.—*Hunter's Roman*

Law, p. 50. These prohibitions were repealed in the next reign.

Divorce by the husband against the wishes of the wife was a power much more likely to be abused than that of dissolving marriage by mutual consent. Although the legal right was recognized, it is said not to have been acted upon for a period of five hundred years, and Spurius Carvilius is said to have been the first who put away his wife for barrenness. Harshness in the exercise of the power was condemned by public opinion, and sometimes punished by authority of censors.

L. Antonius, a senator, was expelled from the senate for a harsh divorce of a young wife.

The wife, who had not come under the *manus* of the husband, had the same power of repudiating the marriage at will. Later legislation curbed this excessive license. By a later law a husband divorcing a wife for adultery, might retain one-sixth of her dowery; for a smaller offense only one-eighth. When the husband was guilty of adultery, he had to repay the dowery at once; if the fault was less serious, in six months.

Constantine allowed the wife to divorce the husband in the following cases: 1. For murder.

2. For being a preparer of poisons. 3. For violating tombs. Just causes for repudiation by the husband were: 1. Adultery. 2. Preparing poisons. 3. Being a procuress. A wife divorcing her husband for other than specified causes, forfeited the dowery, and might be punished by deportation. Similarly a husband lost his interest in the dowery of his wife by any injurious divorce. Similar provisions are to be found in the legislation of Honorius and Theodorus (421 A. D.).

Justinian settled the grounds of divorce as follows: The wife could divorce her husband. 1. For conspiracy against the Empire. 2. Attempting her life. 3. Attempting to induce her to commit adultery. 4. Wrongfully accusing her of adultery. 5. Taking a paramour to his house, or frequenting any other house in the same town with a paramour. On a divorce for these reasons, a wife recovered her dowery and obtained the husband's portion as well. If she divorced for other reasons she forfeited her dowery, and could not marry for five years, as in the legislation of Theodosius and Valentinian. So a husband might justly divorce his wife for: 1. Concealment of plots against the Empire. 2. Adultery. 3. Attempting her

husband's life or concealing plots against him. 4. Going to baths or banquets with other men. 5. Remaining from home against her husband's wishes. 6. Going to circus, theatre, or amphitheatre against his wishes. In such cases the husband retains the dowery for life, or if he had no children, absolutely. The grounds for divorce specified in these various enactments are an interesting commentary on contemporary manners.

These experiments in divorce legislation display anxiety to regulate the relationship of marriage as a purely civil institution, with a view mainly to public decorum and the comfort of individuals. When marriage had manifestly failed, it was no longer worth preserving, and it had failed when either of the parties showed a desire to withdraw from the alliance. At the same time, an innocent party must be protected against the caprices of an unjust spouse, and such protection was sought by the devices just described. It is a remarkable illustration of the Roman view of marriage that, in view of what must have been the great social evil of capricious divorce, the right of either party to dissolve the marriage was never successfully questioned.

From the pure Roman to the canon law, the change is great indeed. The ceremony became sacred, the tie indissoluble. "Those whom God hath joined let no man put asunder," was the first text of the new law of marriage, and against such a prohibition social convenience and experience pleaded in vain. While marriage once created became indissoluble, the impediments to marriage also multiplied. The canon law annulled a marriage *ab initio* for causes which we would now consider wholly inadequate. The tie of consanguinity was extended to the eighth generation; and affinity, it was held, might be established by adulterous intercourse without marriage.

The power of dispensing with canonical disabilities, and the power of annulling marriage on the ground of such disabilities, belonged to the church, and were important aids to its influence in society. In countries which have embraced the doctrines of the Reformation, a relaxation of the law of divorce has generally followed the changes of religon, whether immediately, as in Scotland, or indirectly, as in England. In Roman Catholic countries the theory of the canon law still rules. *See Enc. Brit., 9 ed., Vol. VII., Title Divorce.*

CHAPTER IV.

ENGLISH LAW.

The history of divorce in English law is particularly interesting. Down to the passing of the Divorce Act of 1858, the theory of the law of England was the same as that of the Roman church. There were attempts during the period of the Reformation to introduce a greater license of divorce, and in the *Reformatio Legum Ecclesiasticarum* (a code of ecclesiastical law projected by a royal commission, but never enacted) the leaders of the Reformation sanctioned principles which were considered very liberal. Divorce was to be granted for adultery, and the innocent spouse was to be permitted to marry again. Other grounds for divorce were specified, such as desertion, continued absence, and savageness of temper. Separation from bed and board was to be superseded by this more complete remedy. And the more advanced reformers advocated even greater liberty of divorce, justifying their propositions by a reference to the Scriptures.

But the law remained unchanged. The constitution of marriage belonged to the jurisdiction of the ecclesiastical courts. The tie was indissoluble. The marriage, indeed, might be declared null and void in certain cases, *e. g.*, consanguinity or affinity. This proceeding was not a dissolution of marriage so much as a declaration that no real marriage had taken place between the parties.

Divorce from bed and board was granted for adultery and cruelty. Here the marriage, being originally good, was not dissolved, but a separation was ordered either for a limited or indefinite time. The spouse was not permitted to marry again. But while the law remained unchanged, the practice of granting complete divorces by private act of parliament had come into existence.

The legislature did in particular cases that which it refused to do by general law. Two conditions were in general necessary to satisfy parliament: First, a divorce from bed and board had to be obtained from the ecclesiastical court; second, an action for damages had to be brought against the adulterer in the civil courts for criminal conversation. The latter was not absolutely

necessary, and appears to have been regarded as a safeguard against divorces being granted to a person who had connived at the act of adultery, or had themselves been guilty of misconduct in the marriage state. The passage of these acts through parliament became a matter of as much formality as a proceeding in an ordinary law court. The two houses passed standing orders on the subject, under which bills for divorce were argued before the lay lords by professional advocates, and generally neither the house of commons nor the lay lords interfered. By this characteristic evasion, the law of England completely changed its practice while still maintaining its ancient theory of divorce.

Probably the anomalous character of the remedy might not have brought about a change, but for the great expense attending the proceedings. Three suits—ecclesiastical, civil and parliamentary—were necessary. Divorce became a remedy for the rich. The poor were driven to bigamy.

The satirical address of Mr. Justice Maule to a poor man convicted of bigamy, in 1845, put the absurdities of the existing law in a way not likely

to be forgotten. The prisoner's wife had robbed him and ran away with another man. "You should have brought an action," he told him, "and obtained damages, which the other side would probably not have been able to pay, and you would have had to pay your own costs—perhaps a hundred or a hundred and fifty pounds. You should then have gone to the ecclesiastical courts, and obtained a divorce a *mensu et thero*, and then to the house of lords, when, having proved that these preliminaries had been complied with, you would have been enabled to marry again; the expense might amount to five or six hundred, or perhaps a thousand, pounds. You say you are a poor man. But I must tell you that there is not one law for the rich and another for the poor."

It was not until 1857—and not then without determined resistance—that this disgraceful state of things was changed. A commission appointed in 1850 recommended the establishment of a regular court for divorce, and that divorces should be granted for the wife's adultery, but not for the husband's, unless aggravated by other offenses. Bills constructed on these principles were intro-

duced in parliament and successively abandoned or lost, until in 1857 the ministry of the day, by great exertions, carried the bill which is now the act of 20 and 21 Vict., C. 85. Notwithstanding the hostility it excited, the bill proposed little more than a consolidation of jurisdictions; and proceedings in the divorce courts have now, with few exceptions, the same object and result as the former proceedings in parliament and in the civil and ecclesiastical courts. The action for damages for criminal conversation is represented by the adulterer being made a party to the husband's suit. Full divorce is granted on the principles usually recognized by the house of lords; and the other remedies are such as might formerly have been granted by the ecclesiastical courts.

CHAPTER V.

THE LAW OF SCOTLAND.

Divorce for adultery has been recognized in Scotland since the Reformation. It appears not to have been introduced by any statute, but to have been assumed by the post-reformation judges as the common law. In another point the law of Scotland is in advance of the law of England. Divorce for adultery is competent to either spouse; malicious desertion is also a ground for divorce. Recrimination is no bar to an action for divorce in Scotland. Judicial separation is granted for cruelty and adultery. The party injured by the adultery of the other spouse may choose either judicial separation or divorce. The cruelty required to justify judicial separation must, as in England, be of a somewhat aggravated character.

Divorce in Scotland had the effect of remitting the parties to the status of unmarried persons. The law, however, made one exception: a divorced person was not allowed to marry the paramour, at all events if the paramour was named in the

decree; and for this reason the name of the paramour is sometimes omitted, so that the parties may be allowed to marry if they wish. By the Conjugal Rights Amendment Act of 1861, provisions similar to those of the English divorce acts were established.

A deserted wife may apply to the court of sessions for an order to protect any property which she has or may acquire by her own industry, or may succeed to; and such order of protection when made has the effect of a separation from bed and board, in regard to the property rights and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued. When a wife obtains a decree of separation from bed and board, all property she may acquire is to be considered as property belonging to her in reference to which the husband has no rights. She may dispose of it as if she were unmarried and if she dies intestate, it would pass to her heirs and representatives, as if her husband were dead. A wife so separated is capable of entering into obligations and of suing and being sued, as if she were an unmarried woman, and the husband is not liable for her debts, etc.

CHAPTER VI.

PRUSSIA.

In Prussia divorce is allowed for adultery, sodomy and other unnatural vices, malicious desertion, persistent refusal of marital intercourse, plots or practices endangering life or health, ungovernable temper, drunkenness, extravagance, etc., unless corrected after admonition of the judge; failure of the husband to support the wife, hopeless insanity continuing for more than a year; and, where there are no children, deliberate mutual consent.

HOLLAND.

Allows divorces for adultery and desertion.

FRANCE.

The civil code of France allowed divorce:

1. For adultery of the wife, but not for adultery of the husband, except where he brought a paramour or concubine into his house. 2. To either party for any outrage, cruelty or greivous wrong inflicted upon him or her by the other party. 3. To

either upon the condemnation of the other to an infamous punishment, which is elsewhere defined to be either imprisonment, banishment, loss of civil rights, or being placed in the public stocks. 4. By mutual consent, with other satisfactory proof that the continuance of the marriage would be insupportable. These provisions were rescinded in the religious reaction of 1816. A law was passed (May, 1816) eliminating divorce from the civil code and re-establishing the old law, which allowed only separation. Ineffectual attempts to change this law were made at various times, and the agitation of this question was kept up until the present year, and has resulted in the passage of a divorce law, the exact text of which the writer is not informed. But it is learned through the press that within a week after the law took effect over three thousand applications for divorce were filed in the city of Paris alone.

CHAPTER VII.

THE UNITED STATES.

The matrimonial law of England at the time of the adoption of the Declaration of Independence, forms a part of the common law of the United States.

But as no ecclesiastical courts have ever existed here, those courts upon whom jurisdiction has been conferred have adopted that part of the English law of divorce not inconsistent with the spirit of our institutions. There is no national jurisdiction in divorce, and though it is competent to congress to authorize divorces in territories—so far as the writer knows—that body has never yet exercised this power, but has left it like most other subjects, to the legislatures of the several territories.

In the earlier states, as in England, divorces were at first granted by the legislative power. But gradually those states have by statutory law delegated the subject of divorce to the several courts of their respective jurisdictions, and the

newer states have followed the example thus set. In fact, in some of the states—by constitutional enactment—legislative divorces have been prohibited. It is contended that legislative divorces are debarred by general clauses in the constitution of the United States. This instrument provides that "no state shall pass laws impairing the obligations of contracts." *U. S. Constitution, Art. I., Sec. 10, Dartmouth College v. Woodward, 4 Wheat., 518.*

And inasmuch as marriage is a civil contract, that this clause prohibits legislative divorces. However, Bishop in his work on marriage and divorce, says "that it is settled law, that legislative divorces are not invalid as impairing the obligations of contracts." *Bishop on Marriage and Divorce, Vol. I., Sec. 665.*

Mr. Bishop contends with great force and much show of reason, that marriage is not a civil contract only, but a status, and that "when the contract to become husband and wife is executed by the parties becoming such, then the status assumed stands before the law a thing of legal institution, to be regulated, from time to time, as the public good may determine." In other words, that after

the marriage is actually consummated, the law of contracts ceases to apply, and the parties are ever afterwards — in their wedded relationship — governed by the law of husband and wife.

But the supreme court of the state of Missouri, in the case of *The State vs. Fry* (reported in 4th Missouri Reports, page 120), decided this question against the validity of such divorces, and, later, the supreme court of Florida followed the Missouri court. *See Powder vs. Graham, 4th Florida Reports, page 23.*

In view of the known policy of the various states against such divorces, this subject is of no great importance, and has no place in a work like this. The practice throughout the states is to confer jurisdiction in divorce on the courts of equity to be administered in general accordance with the ordinary rules of equity practice. Each state, of course, determines for itself the causes for which divorces may be granted.

The states are to each other, in the matter of divorce, as foreign countries, and the tribunals of a state have no jurisdiction in divorce, if neither of the parties has an actual *bona fide* domicile within its borders. Each state has the exclusive

right to determine the matrimonial status of persons domiciled within it, the causes for divorce, and what courts shall have jurisdiction to grant the same.

In the language of Judge Story, "The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper court to decree a divorce for any cause allowed by the local law, without reference to the law of the original place of marriage, or to the place where the offense was committed." *Story Confl. Laws, Sec. 230 a.* "This doctrine," says Bishop, "has forced its way through many a field of conflict, and its authority is fully acknowledged in the United States." *Bishop on M. and D., Vol. II., Sec. 141.* From which it is concluded: 1. A *bona fide* residence of either party in any state will authorize such party to institute proceedings for divorce in its courts for any cause permitted by its laws, whether arising there or elsewhere. 2. An attempt, by one not a resident, to institute such proceedings is a fraud upon the law, and upon the other party, if such other party is ignorant

of it, and the court gets no jurisdiction of such proceedings, and its decree, if one is made, is inoperative, and void. 3. If a *bona fide* resident institutes proceedings, but service cannot be made on the other party by reason of absence from the state, it is competent to provide by law for service by publication, and such publication will be sufficient for the purposes of a dissolution of the marriage, but not sufficient for other purposes, as, for instance, a decree or order for alimony, or other personal order. Before a party can be bound in such matters, he must have personal notice. 4. A divorce once granted by a court having competent jurisdiction in any state is valid in all other states or countries, and it leaves both parties at liberty to marry again, unless the statute where the divorce is granted, otherwise provides; and, even then, it is presumed such statute could have no force beyond the limits of the state and the parties could be legally married in some other jurisdiction.

CHAPTER VIII.

DOMICILE.

In this connection the legal definition of the word domicile, or the term actual *bona fide* residence—as used in some statutes—becomes important. Mr. Bishop adopts the following: "In whatsoever place an individual has set up his household goods and made the chief seat of his affairs and interests, from which, without some special avocation he has no intention of departing; from which, when he has departed he is considered to be from home; and to which, when he has returned, he is considered to have returned home; in this place there is no doubt whatever he has his domicile." *Bishop in M. and D., Vol. II., Sec. 117.*

"Every person," says Chief Justice Shaw, "must have a domicile somewhere, and a man can have only one domicile for one purpose at one and the same time." *Abington v. North Bridgewater 23, Pick. 170.*

This question of domicile is a question of fact to

be determined by the court or jury, and must be established by proof. Appearance and fact may differ, and the court or jury will closely scan the appearance to see whether really the facts accord with them, for in this particular persons often seek the appearance of a residence or domicile for the special purpose of obtaining a divorce, this for various reasons: for instance, to avoid scandal in their own neighborhood where they are known; or in order to obtain the supposed benefits of a more liberal law, and though a person in an application for a divorce, may swear to a change in his domicile, yet from the facts, every considerate person would set him down as an adventurer, away from home, endeavoring by false representation to obtain from a cheated court a worthless writing in the form of a decree of divorce, wherewith to deceive some unsuspecting woman into a polygamous marriage with him.

For all purposes the domicile of the husband is the domicile of the wife, and if the husband change his domicile, that of the wife follows. In nearly all the states the party applying for a divorce, must by express statute, have resided in the state during a specified period of time, in order

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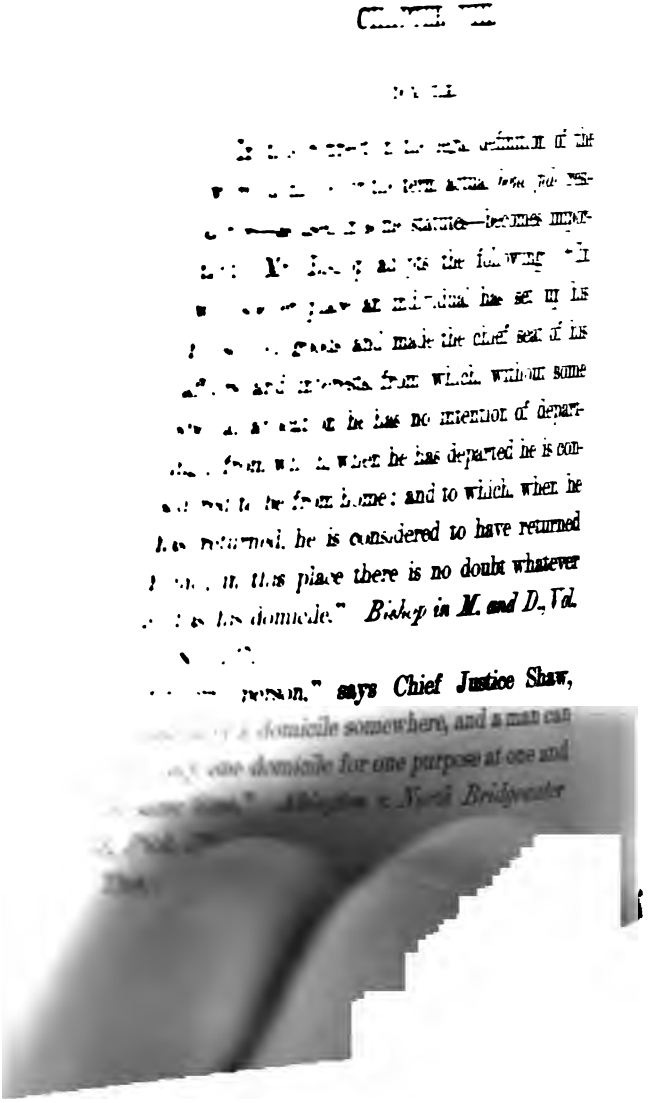

be determined by the court or jury, and must be established by proof. Appearance and fact may differ, and the court or jury will decide upon the appearance as the witness really the facts proved with them. So in the particular person of one who the appearance of a residence or domicile for the special purpose of obtaining a divorce, and for various reasons for instance, to avoid scandal in their own neighborhood which may be known; or in order to obtain the supposed benefits of a more liberal law, and thereby a person in the application for a divorce may swear to a change in his domicile, yet from the fact, every consideration person would see him down as an adventurer, away from home, endeavoring by false representation to obtain from a credulous court a worthless writing in the form of a decree of divorce, wherewith to deceive some unsuspecting woman into a polygamous marriage with him.

For all purposes the domicile of the husband is the domicile of the wife, and if the husband change his domicile, that of the wife follows. In nearly all [illegible] tes the party ap[illegible] for a di- [illegible] ss statute, h[illegible] in the [illegible] fied perio[illegible] order

to give the court jurisdiction over the cause. Now, if the party making application for a divorce be a woman, and her husband be not domiciled there or having been, has changed it, this, under the general proposition that a husband's domicile is the domicile of the wife, would defeat the cause, and although in such case the husband may have been guilty of all the matrimonial offenses known to the law, yet by simply changing the domicile the husband could prevent a decree. For these reasons the law permits a wife to establish a domicile of her own for the purpose of divorce. A further reason for the exception is, that the theory of the law being that the husband and wife are in law one, and that it is the duty of the wife to dwell with her husband; that where he dwells, she should dwell. Now, if he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without judicial determination of the question, from her duty to dwell with him, but she must abandon him, or the cohabitation will amount to condonation and bar her right to a divorce. "In other words," says Mr. Bishop, "she must establish a domicile of her own,

separate from his; though it may be, or not, in the same judicial locality with his. Where the wife is the plaintiff in a divorce suit, the burden of proof is with her to show that through the fault or misconduct of her husband she is entitled to a separate domicile." But is seems that a separate domicile to the wife in divorce proceedings is optional with her, she can if she choose, follow the domicile of the husband and bring her suit against him even in a state where she had never been domiciled or resided. *Ashbaugh vs. Ashbaugh, 17 Ill. R. 476, Davis vs. Davis 30 Ill., R. 183.* In other words, where the wife is the plaintiff, it being necessary for the plaintiff in divorce suits to be domiciled within the jurisdiction of the court, yet she may sustain her suit upon her husband's domicile, though she is, in fact, living in another state, and he cannot set up in answer his own wrong, on account of which she has lawfully acquired another domicile. — *Davis vs. Davis supra. Masten vs. Masten, 15 N. H. Reports 150.* Also *Bishop on M. and D., Vol. II., Sec. 127.* See also *Cheever vs. Wilson, 9, Wal. 108.*

CHAPTER IX.

CAUSES FOR DIVORCE IN THE DIFFERENT STATES.

We will now proceed to give the causes recognized by the statutes of the several states as sufficient to warrant an absolute divorce, omitting in the specification, for the sake of brevity, those which under any system would render the marriage void or voidable; viz., a previous marriage still in force, and a marriage under the age of consent or within the prohibited decree of relationship.

ALABAMA.

Physical incapacity, adultery, desertion for two years, imprisonment on a sentence of seven years or more, sodomy, pregnancy at marriage without the husband's knowledge by another man, violence of the husband to the wife endangering her life or reasonable fear thereof. The statute requires one year's actual residence before filing his or her application.

ARKANSAS.

Impotence, desertion for one year, conviction of felony or other infamous crime, habitual drunken-

ness for one year, and cruel and barbarous treatment as endangers life, or such indignities to the person as render the condition intolerable, and adultery. One year's residence is required.

CALIFORNIA.

Adultery, extreme cruelty, consent obtained by force or fraud, willful desertion, willful neglect of the husband to provide for the wife for two years, habitual intemperance, conviction of felony, and marriage of female under the age of fourteen years without the consent of the parent or guardian. Six months' previous residence is required.

COLORADO.

Impotence, adultery, desertion, drunkenness, cruelty, and conviction of felony. Parties plaintiff must reside here one whole year immediately prior to the exhibition and filing application therefor.

CONNECTICUT.

Adultery, fraudulent contract, impotence, willful desertion for three years with total neglect of duty, seven years' absence not heard from, habitual intemperance, intolerable cruelty, sentence to imprisonment for life, beastiality, or any other

infamous crime involving a violation of conjugal duty and punishable by imprisonment in state prison, or any such misconduct as permanently destroys happiness and defeats the purposes of marriage. Three years' residence is required before making application.

DELAWARE.

Adultery of the wife, or impotence of either party, adultery of the husband being only cause for divorce from bed and board; cruelty and desertion. No definite time of residence before making application is specified by the statute.

FLORIDA.

Impotence, adultery, extreme cruelty, habitual indulgence in violent and ungovernable temper, habitual intemperance, desertion for one year. Residence required is three months.

GEORGIA.

Mental incapacity, impotence, force, duress, or fraud in obtaining the marriage, pregnancy at the time of marriage without the husband's knowledge, adultery, desertion for three years, sentence to the penitentiary for two years or more for an

offense, involving moral turpitude, habitual intoxication, and cruelty. Time of residence is not fixed by statute.

ILLINOIS.

Adultery, impotence, desertion for two years, habitual drunkenness for two years, attempting life by means of poison, or other means showing malice, extreme and repeated cruelty and conviction of felony, or other infamous crime. Parties plaintiff in divorce cases, must have resided in the state one year immediately prior to making application for.

INDIANA.

Adultery, impotence, abandment for a year, cruel and inhuman treatment, habitual drunkenness, failure of the husband to provide, conviction of an infamous crime after marriage, and for such other causes as the court in its discretion may deem sufficient. Two years' residence is required by the statute of this state.

IOWA.

Impotence, adultery, willful desertion for two years, conviction of a felony, habitual drunken-

ness and treatment that endangers life. One year's residence is required.

KANSAS.

Desertion for a year, adultery, impotence, pregnancy at time of marriage by another than the husband, extreme cruelty, fraudulent contract, habitual drunkenness, gross neglect of duty and conviction of felony. One year's residence is required.

KENTUCKY.

Impotence, living apart without cohabitation for five years, abandonment and living in adultery for six months, desertion for a year, conviction of a felony, force, duress or fraud in obtaining marriage, contracting a loathsome disease, uniting with any religious society which requires renunciation of the marriage contract, or forbids cohabitation, confirmed drunkenness of the husband with improvidence, continued for a year; habitual misbehavior of the husband continued in a cruel and inhuman manner, not less than six months, cruel beating or injury of the wife, or attempt at the same, pregnancy at the time of

the marriage without the husband's knowledge; adultery of the wife, or such lewd and lascivious behavior on her part as proves her to be unchaste; confirmed mental unsoundness of not less than three years' continuance, resulting from intemperance or hereditary taint, and concealed at the time of marriage. One year's residence is required.

LOUISIANA.

Adultery, habitual intemperance, cruelty, sentence to ignominous punishment, desertion for five years, fleeing from justice when charged with an infamous offense. No time of residence specified by statute.

MAINE.

Insanity or idiocy, sentence to imprisonment for life; and a divorce may be decreed when the judge deems it reasonable and proper, conducive to domestic harmony and consistent with peace and morality of society. One year's residence is required.

MARYLAND.

Impotence, adultery, three years' desertion, unchastity of the woman before marriage unknown to the husband. Two years' residence is required:

MASSACHUSETTS.

Adultery, impotence, insanity or idiocy at marriage; uniting with a religious sect that professes to believe the relation of the husband and wife void or unlawful, and refusing cohabitation for three years; sentence to confinement for five years or more, and desertion for five consecutive years. Three years' residence is required by statute.

MICHIGAN.

Adultery, impotence, sentence to imprisonment for three years or more, desertion for two years, habitual drunkenness, extreme cruelty, gross, wanton and cruel neglect or refusal by the husband to provide for the wife. One year's residence is required.

MINNESOTA.

Adultery, impotence, cruel and inhuman treatment, sentence to imprisonment in the state prison, willful desertion for three years, habitual drunkenness for a year, and cruelty. One year's residence is required.

MISSISSIPPI.

Impotence, adultery, sentence to penitentiary, desertion for two years, habitual drunkenness,

habitual cruel and inhuman treatment, pregnancy unknown to the husband at the time of marriage, insanity or idocy of one party at the time of marriage unknown to the other. One year's residence is required.

MISSOURI.

Impotence, desertion for a year, adultery, conviction of a felony or infamous crime, habitual drunkenness for a year, cruelty or indignities that render life intolerable, the husband becoming a vagrant; pregnancy by another than the husband without his knowledge at the time of the marriage. One year's residence is required.

NEBRASKA.

Adultery, impotence, sentence to imprisonment for three years or more, desertion for two years, habitual drunkenness, extreme cruelty, and consent obtained by force or fraud. Six months' residence is required.

NEVADA.

Impotence, adultery, desertion for two years, conviction of felony or infamous crime, habitual gross drunkenness incapacitating the party from

contributing to the support of the family, extreme cruelty, and neglect of husband for two years to provide necessaries. Six months' residence is required.

NEW HAMPSHIRE.

Impotence, adultery, extreme cruelty, actual imprisonment on conviction of crime for more than a year, treatment that seriously injures health or endangers reason, three years' absence, not heard from, habitual drunkenness for three years, joining a religious society which professes to believe the relation of marriage unlawful and refusing cohabitation for six months; abandonment for three years with refusal of cohabitation, and refusal of husband to provide for the wife for three years. Time of residence not specified by statute.

NEW JERSEY.

Adultery and desertion for three years. Three years' residence required.

NEW YORK.

Adultery of either party (the sole cause occuring after marriage), impotence, idiocy or lunacy at

the time of marriage, consent obtained by force or fraud. Time of residence not given in the statute.

NORTH CAROLINA.

Impotence, adultery, abandonment and living in adultery. Time of residence not given by statute.

OHIO.

Three years' desertion, adultery, impotence, extreme cruelty, fraudulent contract, gross neglect of duty, habitual drunkenness for three years, and imprisonment under criminal sentence. One year's residence required.

OREGON.

Impotence, adultery, fraudulent contract, sentence for felony, habitual drunkenness for two years, desertion for three years, cruel and inhuman treatment or indignities rendering life burdensome. One year's residence required.

PENNSYLVANIA.

Impotence, adultery, desertion for two years, cruel treatment or indignities that render the condition intolerable and life burdensome, fraud, force or coercion in procuring the marriage, sen-

tence for two years' imprisonment for felony, becoming a lunatic, or *non compos mentis*. One year's residence required.

RHODE ISLAND.

Impotence, adultery, extreme cruelty, desertion for five years or less in the discretion of the court; continual drunkenness, neglect or refusal of the husband to provide necessaries, gross misbehavior and wickedness in either party repugnant to or in violation of the marriage contract. One year's residence required.

SOUTH CAROLINA.

Adultery, desertion for two years, and the deserting party may have divorce if the desertion is justified by cruel treatment or neglect of the husband to provide maintenance. Time of residence not given.

TENNESSEE.

Impotence, adultery, desertion for two years, conviction of infamous crime or of felony, malicious attempt upon the life of the spouse, pregnancy by another person at the time of the marriage without the husband's knowledge, cruelty,

indignities by the husband to the wife forcing her to withdraw from him, abandonment of wife or turning her out of doors and refusal to provide for her. Two years' residence required.

TEXAS.

Impotence, adultery of the wife, desertion, adultery of the husband and abandonment of the wife for three years, and cruelty. Time of residence not given by statute.

VERMONT.

Idiocy or lunacy at time of marriage, adultery, sentence to imprisonment for three years or more with actual confinement, intolerable severity, desertion for three years, absence for seven years without being heard from, neglect of the husband to provide maintenance. One year's residence required.

VIRGINIA.

Adultery, impotence, sentence to the penitentiary, fleeing from justice for a felony and remaining absent for two years, desertion for five years, pregnancy at the time of marriage by some person other than her husband without the husband's knowledge, prostitution by the wife before mar-

able sterility existed. Medical writers have said, without qualification, that such fact cannot be established. *Guy, Ferensic Med., Harpers' Am. ed., 51.* Therefore, the usual inquiry is, Is there any discoverable malformation that would prevent copula? The contract of marriage implies that the parties are capable of consummating it, so if a party knowing his defects induces a person not cognizant of them to marry him, he commits thereby a gross fraud and grievous injury, and even if he himself is ignorant of it, there is equally a violation of the contract, and equally an injury, though without intentional wrong. In the former case, the marriage would clearly be voidable on the sole ground of fraud; in the latter, it would seem to be equally voidable, on the grounds of mistake, and the violation of an implied warranty. *Bishop on M. and D., Vol. II., Sec. 323.*

Fraudulent representations by either party in respect to his or her conditions in life, pecuniary circumstances, family connection, bodily health, and the like, however material these may have been in inducing a consent to the contract, still are unavailable as an impeachment of the mar-

riage. A false personation of another, or any fraud by which one of the parties is deceived in respect to the person with whom the marriage is solemnized, is a sufficient cause for annulling the marriage; but this is put upon the ground of want of consent, it being equally essential to this, as to other contracts, that there should be the *animus contrahendi*, and the contract cannot take effect contrary to the real intention of the party who is to be bound.

A marriage accomplished by force may be annulled at the option of the party wronged; so may a marriage, one party to which was under the age of consent, or where the parties are within the prohibited degree of consanguinity or affinity, or where one has already a wife or husband living, from whom he or she is not divorced. In these cases judicial proceedings are not necessary, but are enjoined and permitted grounds of prudence and propriety, and in that any question, which might be the subject dispute or doubt, may be conclusively determined The nature of a fraud that shall invalidate a marriage it is not easy to define; but it may safely be assumed that it must be something en-

tering into the very essentials of the relation, such as deception in respect to the person with whom the ceremony is performed. "If," says Mr. Bishop, "a woman who has been defiled pretends to be a virgin, and a man marries her on his faith in this pretension, the marriage is nevertheless good, even though she is a common prostitute."—*Bishop on M. and D., Vol. I, Sec. 179.*

It has been held in some cases that if the woman, without the man's knowledge, is pregnant by a person other than himself, at the time of the ceremony, this is such a fraud as justifies a decree of nullity. This has also been made a cause of divorce by several states by statute. *Leavitt vs. Leavitt, 13 Michigan Reports, p. 452. Dawson vs. Dawson, 18 Michigan Reports, p. 355. Reynolds vs. Reynolds, 3d Allen, p. 605.*

In some of the states there are statutory pro-
Sections, authorizing divorce when the female, be-
Fraumarriage, has been guilty of illicit carnal
respecourse with another man, the same being
cinknown to the husband at the time of the mar-
riage. But this is no cause for divorce, unless made so by specific statutory law. The rule in relation to evidence in all such cases is, that he

who alleges fraud takes upon himself the burden of proving it; fraud being a dereliction of duty, is never presumed, consequently it must be established by proof.

CHAPTER XI.

SPECIFIC CAUSES FOR DIVORCE OCCURRING AFTER MARRIAGE.

We will now proceed to consider the specific causes for divorces, common to the laws of the various states of the Union. We have already examined the various defects which make the marriage void or voidable. We now call your attention to all those breaches of matrimonial duty, which, occurring after the marriage, authorize a dissolution of it.

ADULTERY.

Adultery is almost universally a cause for divorce. It consists of the voluntary sexual intercourse of one of the married parties with a person other than the husband or wife; it can be committed only by a married person, and it is immaterial whether the *particeps criminis* is married or single.

In criminal law, to constitute adultery, as to constitute any other crime, there must be a criminal intent; and the same rule prevails in the law

of divorce; a wife, were she the victim of rape, could not be guilty of adultery, for there must be a joinder of act and intent to constitute such. If one of the married parties goes into another state or county, not changing in good faith his domicile, but for the mere temporary purpose of obtaining a divorce, and obtains it, imposing upon the foreign tribunal (for, unless imposed upon, it would not grant a divorce to such a party), the divorce is absolutely void. If such party should enter into a formal marriage with another person, such marriage would be void; and cohabitation under it would be adultery. *Leith vs. Leith, 39 N. H. 20. McGiffert vs. McGiffert, 31 Barb. 69.*

"The difficulty most embarrassing," says Mr. Bishop, "in seeking a divorce upon the ground of adultery is found to lie in the evidence; a single act of adultery being sufficient to establish a cause, the plaintiff need go no farther than this act by testimony."

But adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised in it; and so it not only may, but ordinarily must, be established by circumstantial evidence. To prove adultery by circumstantial evidence two points

are to be ascertained and established—the opportunity for the crime, and the will to commit it. Where both of these are established, the court will infer guilt. *Moore vs. Moore, 1 Green, N. J. 122.*

CRUELTY.

"Of those things in law," says Bishop, "which require definition, there is no one more difficult to define than legal cruelty," and the same author in his later additions defines cruelty to be "such conduct in one of the married parties as endangers, either apparently or in fact, the physical safety or health of the other, to a degree rendering it physically or mentally impossible for the endangered party to discharge properly the duties imposed by marriage." *See Bishop on M. and D., Vol. I., Sec. 716, and authorities cited.* This cruelty must be corporeal, or mental and corporeal combined, for, says our author, "It is admitted that pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more misery on a sensitive and effectionate wife, by a course of conduct addressed only to the mind, than if in fits of anger he were to inflict blows upon her person, yet alone this would

be no cause for divorce. But it is extremely difficult to define with precision what is and what is not cruelty, the same act is not the same thing under all circumstances and to all persons; necessarily each case must to a large degree be judged by itself. Still it seems by the authorities to be settled law, that mere mental cruelty unaccompanied by any physical violence is not such cruelty as will suffice for cause for a divorce. However it is thought that slight physical violence accompanied by gross and brutal language and false accusation would suffice in almost any court where cruelty is recognized as a cause for divorce." *See Ward vs. Ward, 103, Ill. 477.* It need hardly be said that the cruelty must be intended.

The evidence necessary to establish cruelty as a cause for divorce differs greatly in different states and in different courts; almost the entire law of cruelty may be considered as belonging to the evidence. The reason is, that, in each case, the leading inquiry concerns future danger rather than past misconduct. "Acts of personal violence, when intrinsically and separately considered, may not justify a divorce; yet, when attended by hab-

itual brutal behavior, so as to be a constant outrage upon the sense of decency and propriety of the party to be affected by them, would constitute cruelty, such as would be deemed sufficient cause for divorce." *Briggs vs. Briggs, 20 Mich. 34.*

DESERTION.

By the common law divorces were not allowed for desertion. In the United States, desertion, as a ground for divorce, is described in various language in the statutes. "But," says Mr. Bishop, "the several phrases employed, when brought by interpretation into conjunction with the general doctrine which governs this department of our jurisprudence, produce substantially the same legal meaning." The length of time of desertion differs from one to five years. The offense consists, 1. In the actual ceasing of the cohabitation as man and wife. 2. The intent in the mind of the offending party to desert the other. These two ingredients must combine, as in adultery, before noticed. It is wholly immaterial whether the distance which the parties remove apart is great or small, so long as the intent is plain. If either party to a marriage, without reason, maliciously

or capriciously refuses copula, this, it seems, would be ground for divorce under this head, if continued a sufficient length of time. A wife or husband has the undoubted right to the full and complete enjoyment of the marital relation, and, if such be denied, time would ripen the offense into desertion, for which a divorce could be had, even though the parties remained in the same house. *See Bishop on M. and D., Vol. I., Sec. 782.*

In considering desertion as a cause for divorce, the intent is very important; a mere absence of the husband on business, or a separation of the parties by mutual consent, made with or without the further understanding that one of them should apply for a divorce, is plainly not desertion. Under the law the husband has the legal right to fix the place of habitation for himself and wife, and if he lawfully and properly undertakes to change his residence, and the wife refuses (having no legal excuse) to go with him, she thereby deserts him. *Walker vs. Leighton, 11 Fost N. H., 111. Hair vs. Hair, 10 Rich., Eg. 163.* If, for any justifiable cause, a spouse is compelled to go away from the common home, this would not be desertion.

The desertion must continue without interruption for the specified statutory length of time, and if the offending party offers, in good faith, to return before the expiration thereof, and the offer is refused, this would bar the remedy, but it is otherwise when the full time has elapsed.

HABITUAL DRUNKENNESS.

What amounts to habitual drunkenness is a question of law. Witness should state particular facts, from which the court will say whether or no it amounts to the crime—for crime it certainly is. If there is a fixed habit of drinking to excess, to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, this is habitual drunkenness. *Barber vs. Barber, 14 Law Review, 375.* The statutes of the different states, making this a cause for divorce, usually specify the duration of time in which the guilty party should continue in his or her habits of drunkenness. It seems that the habitual use of opium or chloroform would not constitute habitual drunkenness, under a statute making this a cause for divorce. *Barber vs. Barber, supra.*

OTHER SPECIFIC CAUSES FOR DIVORCE.

The four titles—adultery, cruelty, desertion, and drunkenness—are the four leading causes for divorce under the present head. It will be seen that in the several states other causes for divorce are allowed. The books throw but little light upon these causes. Mr. Bishop says that the extension of the remedy of divorce beyond the three common heads—adultery, cruelty, and desertion—has not been found, thus far, to operate practically to undo the marriage bond to any great extent. We can give no direction for the conduct of a cause under these heads, that would be of any practical benefit to the reader, but would refer him to Mr. Bishop's works, which can be found in almost any law library.

CHAPTER XII.

DEFENSES TO SUITS FOR DIVORCE.

We will now proceed to consider the defenses that may be interposed to suits for divorce. It is not proposed to discuss this subject specifically, but generally.

CONNIVANCE

is the corrupt consenting of a married party to the conduct in the other of which he afterward complains. It bars the right of divorce, because no injury was received; for what a man has consented to he cannot set up as an injury. No wrong has been done him, and, therefore, there is nothing to redress.

Connivance is a thing of intent, a corrupt consenting. Imprudence or error is not connivance; the intention must be manifest; but it may be a passive permittance, without interference or objection. If a husband suspects his wife of infidelity to his bed, he may watch her, and even leave opportunities open for her, in order to obtain proof of her guilt, but, for this purpose, he

must neither lay temptation in her way, nor provide the opportunities.

Connivance is usually proved by circumstantial evidence, but the facts, like others resting on circumstantial evidence, are established by a variety of attendant facts, often trifling in themselves, yet convincing in combination. When it is shown to the satisfaction of the court it is a complete bar to the suit for divorce.

COLLUSION

is an offense nearly akin to connivance. It is defined by the courts to be an agreement between husband and wife, for one of them to commit, or to appear to commit, or to be represented in court as having committed, a breach of matrimonial duty, for the purpose of enabling the other to obtain a divorce, as for a real injury.

When the act complained of for ground of divorce has in truth not been done, collusion is a real or attempted fraud upon the court; when it has it is also a species of connivance: in either case it is a bar to the prayer for divorce. Collusion thus described relates to what is done out of court, preparatory to a deception to be practiced

upon the court. But however just a cause in itself may be, if parties corruptly collude in the management of it before the court, so that in reality both are plaintiffs, while by the record the one appears as plaintiff and the other as defendant, this, in reason, and it is believed also in point of authority, will, as collusion, bar the proceedings. *Bishop on Marriages and Divorces, Vol. II., Sec. 28 a.* Collusion of course will not be presumed without some proof, yet it may appear by the conduct of the parties, and if the court is satisfied that such is the case, the proceedings will be dismissed. It is in the nature of a conspiracy and cannot be committed by one party.

CONDONATION.

This defense, says Bishop, differs from connivance the same as a plea in discharge of a contract differs from a plea denying the original obligation. In connivance no injury is done the party complaining, because he consents thereto; in condonation the injury is forgiven. Condonation therefore in divorce law is the conditional forgiveness, or remission by the husband or wife of a matrimonial offense which the other has committed,

the conditions being that the offense will not be repeated, and that the guilty party shall be treated by the other party with conjugal kindness. While the conditions remain unbroken, condonation is an absolute bar to the remedy for the particular injury condoned. This doctrine, says Bishop, has its foundation in natural justice, and prevails in most civilized countries.

The definition of condonation adopted by Mr. Bishop is as follows: "Condonation means a conditional blotting out of the offense imputed, so as to restore the offending party to the same position he or she occupied before the offense was committed." It seems that condonation must be something more than mere forgiveness; it must be a reconciliation, provided of course that the guilty party commits no other matrimonial offense, for in such case the condition is broken and a divorce can be had for the original offense condoned. Condonation may be expressed in words or it may arise by implication out of acts done. In other words, a matrimonial offense known to have been committed may be condoned by agreement expressed in words, or it may be inferred by the act of the parties: for if a husband

knowing his wife to be guilty of adultery voluntarily continues to cohabit with her, he thereby condones the offense. But a forgiveness cannot take place without a knowledge of the existence of the thing forgiven. To establish condonation so as to bar a divorce proceeding it must appear by the evidence: 1st, That a matrimonial offense was committed; 2d, That it was known to the innocent party; 3d, That with such knowledge he or she voluntarily forgave the offense and renewed conjugal relationship. When so made to appear it is a complete answer to and a bar of a proceeding for divorce.

RECRIMINATION.

"The doctrine of recrimination," says Mr. Bishop, "rests in the clearest reason and in exact justice. Through all the field of our jurisprudence there extends the one general doctrine, modified variously in various relations, yet everywhere preserving its identity, according to which he who is himself in the wrong cannot be heard to complain, in a court of justice, of another's wrong pertaining to the same matter; and it is not sufficient that the plaintiff is less faulty than

the defendant; he must come into court, as the expression is, 'with clean hands.'" *Bishop on M. and D., Vol. II., Sec. 75.*

In a suit by one against another for damages caused by careless driving, the complaining party must show that he was not guilty of the same offense, else his remedy for damages sustained would be barred. In a suit for a breach of a contract, resting in mutual dependent covenants, the plaintiff, if he would succeed, must have kept his covenants, etc.; and, in accordance with this rule, it is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if himself guilty likewise; and when the defendant sets up such guilt in answer to the plaintiff's suit, this is called, in the matrimonial law, recrimination. "It is not unfit," says Bishop, "if he who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced. If he who has first violated his marriage vow should be barred of his remedy, the parties may live together and find sources of mutual forgiveness in the humiliation of mutual

guilt. Such parties are suitable and proper companions for one another."

The best legal definition of recrimination seems to be that the defense, which consists in showing that the complainant in a divorce suit has himself broken, either completely or in part, the same matrimonial chain, of whose breach by the other party, whether in the same or any other of its links, he complains. *Bishop on M. and D., Vol. II., Sec. 78.*

A more general definition is, that recrimination is a bar to the matrimonial suit, resting on the fact of the complainants being guilty of the same offense. Of course, recrimination must be established by evidence sufficiently strong to convince the court of its existence, and, when so established, it will be a complete bar to the plaintiff's right to a divorce.

CONSEQUENCES OF DIVORCE.

We come now to consider the consequences proceeding from the divorce. They are those which flow from it by operation of law, and those which the sentence of the court expressly ordain.

Where the marriage is void or voidable, the sentence of nullity is declaratory only; in substance it declares that no marriage has ever existed, and the parties, as between themselves, are to be treated as though no marriage had ever existed. The husband can take no property by reason thereof, and if any has come into his hands he must restore it. As to third parties, however, during the time that the parties live and cohabit together, they are treated as husband and wife, and a man, living with a woman and holding her out to the world as his wife, would be responsible to all persons as though he were legally married; third parties need go no further than appearances in order to hold either party. After sentence of nullity it, of course, is different.

If a man, having a wife living, from whom he has not been legally divorced, marries another woman, the latter can compel him to account to her for all monies, rents, and profits that may have come into his hands by reason of this second void marriage, and he can claim nothing by reason thereof.

Where a marriage is dissolved, having been originally valid, the consequences are quite differ-

ent from those which follow the annulling of a voidable marriage. The approved doctrine is, that a divorce from the bonds of matrimony places both parties, the innocent and the guilty, in the condition of single persons, except where some provision of the law, on which the divorce is founded, or the decree of the court, expressly provides otherwise.

In some of the states it is provided by statute that the decree shall dissolve the marriage only as to the innocent party, and then the difficulty is, can the other party marry again, either in the state where the divorce is granted or elsewhere.

In many of the states the same general law which authorizes the divorce forbids the guilty party to contract a second marriage, and upon this, says Mr. Bishop, "comes the doubt, whether he may marry in any other state or country. The universal rule, however, supported by ample authority, is, that a marriage in disregard of such a penal prohibition is good." *The State vs. Robbins, 6 Ire. 23. Damon's Case, 6 Greenl. 148. Londonderry vs. Chester, 2 N. H. 268.* That is, the statute provides that such party shall not marry again, and fixes (usually) a penalty for so

doing. Now, if such party marries in violation of such penal law he is subject to the penalty thus imposed, but, nevertheless, the marriage would be good, unless express words of nullity are used in the statute, the cases above cited having arisen under statutes forbidding the celebration of marriage except in a certain prescribed form.

The doctrine is established that any divorce which releases one party from the marriage necessarily frees the other party also, whatever be the terms of it, or of the legislative act under which it is granted, because there cannot be a husband without a wife, nor a wife without a husband.

If, for example, the statute prohibits the party in fault from contracting a second marriage, and, nevertheless, he contracts one, he may be punished criminally under the particular provision of this law, but not punished under a provision against either polygamy or adultery. *Commonwealth vs. Putnam, 1st Pick. 136. People vs. Hovey, 5 Barb. 117. Dickson vs. Dickson, 1st Yerg. 110. Calloway vs. Bryan, 6. Jones N. C. 569. Bishop on M. and D., Vol. I., Sec. 149–151–304–307–355–374,* and *Vol. II., Sec. 700.* And in

relation to the right of a guilty party, divorced in one state, under laws prohibiting a second marriage to such party, to marry again outside of said state: It is well established that penal laws have no extra territorial force, and such party could marry again in another jurisdiction, where he or she might be then domiciled, without being punished therefor. *Dickson vs. Dickson, Supra. Putnam vs. Putnam, 8 Pick. 433.* Again, if a party divorced in one state should remove into another state, where such second marriage was prohibited, nevertheless, he or she could remarry in the latter state. *Cambridge vs. Lexington, 1 Pick. 510.*

CHAPTER XIII.

PROPERTY RIGHTS.

The decree of divorce does not undo a marriage originally valid, but expressly affirms it, and, therefore, does not restore the parties to their former condition, but places them in a new one. Consequently, all transfers of property which were actually executed, either in law or fact, abide. But the divorce puts an end to all rights depending upon the marriage, and *not actually vested* as dower in the wife, courtesy in the husband, and his right to reduce to possession her choses in action, when, after this divorce, a man dies, the woman is not his widow; therefore, no rights which the law gives to widows are hers. *Dobson vs. Butler, 17 Misso. 87. Chenowith vs. Chenowith, 17 Ind. 2.*

It is the well-established doctrine in our country, that, unless a statute otherwise ordains, no woman can have dower where there was no valid subsisting marriage at the time of the husband's death. It has, however, been held by the courts

in Ohio, that a divorce decreed upon the prayer of the husband in a foreign state, while the wife was an inhabitant of Ohio, did not take away her right of dower in Ohio. But it is provided in most of the states by statute that, when the wife is the innocent party, she shall be entitled, immediately on divorce, to dower in the lands of the husband, in like manner as if he were dead. Or like the statute of Illinois, which provides: "If any husband or wife is divorced for the fault or misconduct of the other, except where the marriage is void from the beginning, he or she shall not thereby lose dower, nor the benefits of any such jointure. But if such divorce shall be for his or her own fault or misconduct, such dower or jointure, and any estate granted by the laws of this state, in the real or personal estate of the other, shall be forfeited." But if, in the first case, alimony is decreed in lieu of dower, or, in the latter, if alimony is decreed, this, of course, would bar the right of dower.

CHAPTER XIV.

EFFECT AND STABILITY OF THE SENTENCE AS BETWEEN THE PARTIES.

Where the court has jurisdiction of the parties, and the subject-matter of the controversy, the judgment or the decree of the court on it is never void, but only voidable. Where the court has no jurisdiction, and usurpation takes its place, then all the acts of such court are void and of no effect, and may be so treated by any court in any proceedings. In such case there is no authority in such court to pronounce judgment, and, consequently, a decree of divorce so entered has no substance, force, or authority, and no court has authority or jurisdiction to grant a divorce in any case, unless the plaintiff, at least, is domiciled *bona fide* in the state where the application is made.

If the court had authority to grant a decree of divorce, and is induced to grant the same upon false and fraudulent testimony, or other fraud, such decree of divorce is nevertheless good and

binding upon the parties and all the world as long as it is suffered to stand of record in the court granting it, but it can be set aside upon notice to the original plaintiff at any time thereafter. This proceeding to set aside must, however, be made to the court that granted the decree of divorce. When parties resort to the courts of a foreign state or country, without a change of domicile, for the purpose of obtaining a divorce to which they would not be entitled by the laws of their own country, the divorce, as we have seen, will be treated as void, the true principle being, says Bishop, that the foreign tribunal had no proper jurisdiction over the subject matter, that being one of status, with which the courts of the parties' domicile are alone competent to deal. The courts of last resort have so held in New York, Vermont, Indiana and Michigan; and, in fact, all courts have so held when and wherever the question has been presented to them for adjudication. *See Cheever vs. Wilson, 9 Wal., U. S. Supreme Court reports, p. 108.*